FILE COPY

IN THE

Supreme Court of the United States

October Term, 1960

No. 241

THOMAS EISTRAT,

Petitioner,

vs.

WILLIAM F. SCHULTHEIS; et al.,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California

THOMAS EISTRAT
1920 S. Almansor Street
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In Propria Persona

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To the Honorable Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Thomas Eistrat, prays that a Writ of Certiorari issue to review the decision of the District Court of Appeal of the State of California, Second Appellate District, Division Three, entered in the above-entitled case on May 18, 1960.

Citations to Opinions Below

The judgment and orders of the trial court are unreported and are included in the Certified Record. The decision of the State District Court of Appeal is printed in Appendix B, hereto, and is reported in 181 A.C.A. 69, 5 Cal. Rptr. 77.

Jurisdiction

The decision of the District Court of Appeal of the State of California was entered on May 18, 1960 (Cert. Rec. Doc. H, Appx. B, infra). Petition for Rehearing was denied on June 14, 1960 (Cert. Rec. Doc. G). Petition for Hearing, After Decision of the District Court of Appeal, was denied by the Supreme Court of the State of California on July 12, 1960 (Cert. Rec. Doc. H). Application for Recall of Remittitur on Court's Own Motion was filed November 21, 1960 (Cert. Rec. Doc. I).

The jurisdiction of the Court is invoked under 28 U.S.C., Section 1257(3) (since a right to due process of law is claimed under the Fourteenth Amendment of the Constitution of the United States). On October 10, 1960 this Court made its order extending the time for filing petition for Writ of Certiorari in above-entitled cause to and including December 9, 1960.

Questions Presented for Review

1. Whether a litigant has been deprived of his property without due process of law and in contravention of his rights under the Fourteenth Amendment of the Constitution of the United States, where the state trial court receives final orders of a federal court in bankruptcy establishing his title to lumber, and the state courts then collaterally attack and avoid those federal judgments by untrue matters not in the record nor in evidence before the state courts?

2. Whether it is a denial of due process under the XIVth Amendment of the United States Constitution for the highest California state court in which appeal could be had to hold petitioner bound a portion

of a finding of a federal court it deems against petitioner, which finding was unnecessary to support the federal judgment which was final and wholely in petitioner's favor? The federal judgment was received in evidence. Federal and state case law prohibit such collateral attack.

3. Whether it is a denial of due process under the XIVth Amendment of the United States Constitution for the highest California state court in which appeal could be had to hold that a final bankruptcy court order in evidence *is not*, in respect to the matter directly adjudged, conclusive between the parties *and their successors in interest* by title subsequent to the commencement of the action, litigating for the same thing under the same title and in the same capacity, with actual or constructive notice of the pendency of the bankruptcy proceeding?

Constitutional Provisions and Statutes Involved

Art. I, Sec. 8, sub. 4; Art. III, Sec. 2; Art. IV; Art. VI of the United States Constitution and Amendment XIV thereto; U.S.C. 1946 Sec. 1(10), Chap. 1. Title 11; and Sec. 11(a), Chap. 2, Title 11, Bankruptcy Act; and California Code of Civil Procedure, Sec. 1908. They are printed in Appendix A, hereto.

Statement of the Case

The Facts

Each of these consolidated cases are from judgments for defendants in regard to the conversion of lumber from plaintiff's property in 1949. The lumber was taken during respondent Jone's bankruptcy pro-

ceeding, with notice of petitioner's adverse claims to the lumber and his petition to reclaim the property filed therein. The bankruptcy court entered final order granting the petition to reclaim the lumber. The state courts have refused to give effect to the final orders of the bankruptcy court.

The judgment of the trial court was improvidently affirmed under a mistake of fact, a mistaken belief that there was an issue in the trial court on which findings were made that the lumber involved herein was *not* the same lumber covered in the order of the United States District Court as that plaintiff alleged had been converted.

There was no such issue before the trial court! There was no such finding by the trial court!

All parties stipulated in open court that the lumber covered in the order of the United States District Court and that plaintiff alleged had been converted was the same lumber and belonged to plaintiff herein.

During the trial herein commencing September 15, 1958, respondents Schultheis and Wattenbarger corportion through their attorney V. P. DiGiorgio — stipulated with petitioner that the lumber delivered to respondents was in fact petitioner's property. Among the other matters the Reporter's Transcript shows the following:

> "MR. DiGIORGIO: . . . I will stipulate to that. That is, that the property they got from me as trustee or receiver actually at that time was in fact your property.
>
> MR. EISTRAT: And as to Schultheis you stipulated the same, except you delete from the stipu-

lation the statement that he ever kept any property. . . .

MR. DiGIORGIO: I would say so, yes . . . .

MR. JONES: The only stipulation that I can see that they could possibly make is that all the lumber, regardless of where it was at that time during those months, did come off of your property regardless of who bought it; that is the only stipulation.

THE COURT: In what manner?

MR. JONES: Through the months — that was through '49, the period of time in question, I was operating on his timber."

(Cert. Rec. Doc. C RT 112: 19-25; 113: 3, 13-21)

The trial court herein found that Schultheis *did not keep* that lumber. The United States District Court, in the proceeding in which Schultheis was a party, by final turn-over order held that Schultheis *did keep* and convert that lumber. (Cert. Documents M and N, being Exhibits 1, 12 in evidence herein.)

The sole issue as to Schultheis before this state appellate court was:

"SINCE THE COURT RECEIVED IN EVIDENCE THE FINAL TURN-OVER ORDER BY THE BANKRUPTCY COURT AGAINST DEFENDANT SCHULTHEIS DECREEING THAT HE HAD TAKEN AND SOLD AND OTHERWISE DISPOSED OF THE LUMBER, IT WAS AGAINST THE LAW FOR THE COURT TO FIND SCHULTHEIS DID NOT

TAKE THE LUMBER, AND TO ENTER JUDGMENT FOR DEFENDANT SCHULTHEIS BASED UPON THAT FINDING WITHOUT SUBSTANTIAL EVIDENCE."

This point was raised in appellant's opening brief; with direct reference to the pages of the Clerk's and Reporter's Transcripts on appeal, and with direct reference to final turn-over order of the bankruptcy court. (Cert. Rec. Doc. D 8-13)

This mistaken belief of this state appellate court as to the issue (which issue cannot exist because of aforesaid stipulation) is elaborated upon on pages 16 to 19 of Appellant's Petition for Rehearing (Cert. Rec. Doc. G 16-19).

It appears to appellant that this state appellate court would have reversed the trial court, had not the appellate court had a mistaken belief that there was an issue in the trial court on which findings were made that the lumber involved herein was *not* the same lumber covered in the order of the United States District Court as that plaintiff alleged had been converted by Schultheis.

It is irrelevant that Schultheis paid and took lumber from Jones about *July* 1948, before coming on appellant's land. The lumber here involved was cut from appellant's land after commencement of the Jones bankruptcy proceedings in 1949. Schultheis took the 1949 cut from appellant's land lumber through the bankruptcy proceeding under the chance that the trustee might be able to give Schultheis good title thereto. When it appeared to Schultheis that the trustee might not prevail over appellant on the petition

to reclaim, Schultheis refused to return or pay for the lumber. The trustee secured a petition for turn-over against Schultheis.

In the turn-over proceeding in which petitioner herein was not a party, the trustee prevailed over Schultheis. Although Schultheis appeared therein, and the bankruptcy court decreed Schultheis took and kept the lumber, Schultheis did not appeal the order and it became final.

Thereafter petitioner herein prevailed over the trustee, with the bankruptcy court holding that this lumber belonged to petitioner. Schultheis attorney has actually stipulated during the trial herein that:

> "I will stipulate to that. That is, that the property they got from me as trustee or receiver actually at that time was in fact your property."
>
> (Cert. Rec. Doc. C 112: 19-25)

Thus, the error of the trial court herein made was to give no weight to the final turn-over order of the bankruptcy court, after appearance therein by Schultheis, specifically holding within its jurisdiction that Schultheis not only took the lumber from the trustee, but also kept and converted that lumber.

Thus, the error of the state appellate court herein made was to affirm the judgment on the basis of an untrue assumption nowhere appearing in the record that the lumber herein involved *was not* the same lumber covered in the order of the United States District Court. While making such mistaken assumption, the state appellate court disregarded the (1) the express stipulation in the record in evidence of all parties that

the lumber was the same, and (2) the findings in support of the final bankruptcy court order granting appellant's petition to reclaim his lumber — finding that the lumber was the same.

Petitioner raised the error of the state appellate court in a petition for rehearing before that court, again in a petition for hearing before the State Supreme Court (which declined to exercise its discretionary review). It then appearing that an Application for Recall of Remittitur on Court's Own Motion would be proper for correction of the mistake, petitioner filed such application on November 21, 1960 (Cert. Rec. Doc. I).

As part of the application to recall remittitur, petitioner attached his Motion to Recall Remittitur in *Eistrat v. Brush Industrial Lumber Company, et al.*, 147 Cal. App. 2d 628. It was there stated that should the Brush or Western Hardwood case opinions improperly affect the matter herein, that the matters shown in the motion to recall the Brush case remittitur would be appropriate.

As will be briefly referenced hereinafter, petitioner has urged the federal questions involved at every opportunity to so do before the state courts.

There is no reason in law or equity why Schultheis should be unjustly enriched by keeping lumber which he never even pretends to have paid anyone for, and which he stipulated belongs to appellant herein. Also, when Wattenbarger corporation admitted in evidence it took two loads of petitioner's lumber, there was no good reason for the trial court finding but one load taken.

The Presentation of the Federal Question

The federal court order granting the petition to reclaim petitioner's property was pleaded (Cert. Rec. Doc. B., CT 16). Then, after finding that the trial court *did not* consider the trial court bound by the final order of the bankruptcy court in evidence, on motion for new trial plaintiff stated:

> "the foregoing errors, and each of them, are a substantial violation of plaintiff's rights in contravention of the due process of equal protection clause of the 14th Amendment of the United States Constitution".
>
> (Cert. Rec. Doc. B CT 32)

Plaintiff's memorandum of points and authorities on motion for new trial also then specifically pointed out the mistake of the trial court in disregarding the binding effect of the federal court orders as being res judicata. The United States Supreme Court and California State Supreme Court cases in point were there cited (Cert. Rec. Doc. B CT 33-38).

On appeal the substantial federal questions of the state courts not giving effect to the final orders of the bankruptcy court as res judicata, or the denial of due process, were also raised in Appellant's Opening Brief (Cert. Rec. Doc. D 12, 18); Appellant's Reply Brief (Cert. Rec. Doc. F 14); the opinion and order of the District Court of Appeal (Appendix B herein, also Cert. Rec. Doc. H., appx.); Appellant's Petition for Rehearing (Cert. Rec. Doc. G 3, 7, 8, 21, 31, 35); Appellant's Petition for Hearing in the State Supreme Court (Cert. Rec. Doc. H 2, 5, 8, 9, 11, 12, 17, 19);

and Petitioner's Application for Recall of Remittitur on Court's Own Motion (Cert. Rec. Doc. I, 1-5).

Reasons For Granting the Writ

I

Petitioner has set forth in the statement of the case herein that the state appellate court affirmed the judgment wresting petitioner's lumber from him without compensation for the benefit of respondent Schultheis — under a mistaken belief that the lumber involved herein was not the same as that covered in the final turn-over order of the United States District Court as that petitioner alleged had been converted.

In the petition for rehearing before the District Court of Appeal, again in petition for hearing before the State Supreme Court, and again in application for recall of remittitur on court's own motion — petitioner set forth the court's mistaken belief had not only no support in the record, but also the record showed the express stipulation of all parties during the trial that the lumber involved in the turn-over order against Schultheis came from petitioner's proerty and belonged to petitioner and was the same lumber.

Petitioner asserted before the state courts that such mistake was in contravention of his substantial rights guaranteed by the 14th Amendment of the United States Constitution.

This court has stated in *Baltimore & Ohio Ry. Co. v. United States*, 298 U.S. 349, 366 that:

> "The equal protection of the laws which by the Fourteenth Amendment, no state can deny

to the individual, forbids — the property of one individual — wrested from him for the benefit of another —."

The denial by the state courts of the equal protection of law provided by the XIVth Amendment of the United States Constitution, resulting in the wresting of petitioner's lumber without compensation, is under this point good reason for this Court to grant Writ of Certiorari.

II

Another reason for this Court to grant Writ of Certiorari, would be to correct the errors of the California state courts in collaterally attacking the final federal judgment of a bankruptcy court.

The erroneous collateral attack on the final federal judgment is set forth in Appellant's Petition for Rehearing (Cert. Rec. Doc. G, pp. 3-7); and in Appellant's Petition for Hearing in the State Supreme Court (Cert. Rec. Doc. H, pp. 10, 11). Both petitioners were denied without hearing or opinion. (Cert. Rec. Doc. J and K)

Appellant's petition for rehearing in the Appellate Court stated:

"The aforesaid adverse portion of a finding of the federal court which has been adopted on page 4 of the May 18, 1960 typewritten opinion of this court should be deleted from the opinion." And further,

"In fact, appellant endeavored to assist this appellate court from erring in this regard by

setting forth in his closing brief the points and authorities from our highest courts that hold that such a portion of a finding is not to be used by another court (See App. Reply Brief to Jones' 6:2 to 7:1)."

(Cert. Rec. Doc. G 6)

This highest California state court's reported opinion and judgment (in which appeal could be had) —collaterally attacks federal court judgments. The state court's reported opinion herein errs by giving weight and repeating without stating the law thereon —an unneccesary portion of an erroneous finding of the federal court which does not support (and was not carried into) the final federal judgment in favor of appellant herein. Contrary to the innuendo in that reported opinion of the state appellate court herein— there is no evidence in the record and it is untrue that appellant was ever paid.

The United States Supreme Court has uniformly held that the successful party in a United States District Court has no right to appeal for the purpose of procuring a review of the findings of the federal court below of which he complains (*Lindheimer v. Illinois Bell Tel.*, 292 U.S. 151, 176; *Elect. Fitting Corp. v. Thomas & Betts*, 307 U.S. 241; *Public Service Comm. v. Brashear Lines*, 306 U.S. 204, 206; *N. Y. Tel. v. Maltbie*, 291 U.S. 645)—thus ruling such findings of the federal courts are immaterial and not adjudications against the successful party.

III

The state appellate court in its opinion herein (appendix B) has been erroneously influenced by *Eistrat*

v. Brush, 124 Cal. App. 2d 42 in regard to who is bound by a final judgment of a federal court.

The opinion quotes from the *Brush* case and states Schultheis is not bound by the final bankruptcy court order granting petitioner's petition to reclaim his property, and the supporting findings therein — because *Schultheis was not a party* to the petition to reclaim.

Schultheis *did not have to be a party.* He was a successor in interest subsequent to the commencement of the bankruptcy action (and also to commencement of petitioner's petition to reclaim against the trustee, et al) to whatever title the trustee had. Schultheis as successor in interest to the trustee took a chance with actual notice of petitioner's pending petition to reclaim — that the bankruptcy court might decree that the trustee had no title. The bankruptcy court so did. Schultheis stood in the trustee's shoes and was bound thereby.

The California law is clearly set forth in Section 1908, *Code of Civil Procedure*, as follows:

> "The effect of a final order in an action . . . before a court . . . of the United States, having jurisdiction to pronounce judgment or order is as follows:
>
> 1. . . . against a specific thing . . . conclusive up . the title . . . or relation of the person.
>
> 2. In ot r cases, . . . conclusive between . . . success s in interest by title subsequent to the comm ncement of the action . . . ."

This Court, in *Hea r v. Woodruff*, 327 U.S. 726, 733; *Stoll v. Gottlieb*, 305 U.S. 165, and *Chicot County*

Dist. v. Bank, 308 U.S. 371, has heretofore required that effect be given in state courts to a plea of res adjudicata arising from a final decree of a bankruptcy court.

This court has also stated in *Stoll v. Gottlieb*, 305 U.S. 165, that the failure of a state court to give full faith and credit to a bankruptcy court judgment raises a federal question and confers jurisdiction upon the United States Supreme Court.

It is respectfully submitted that this also is a good reason for the granting of a writ of certiorari herein.

CONCLUSION

The state court judgment not being supportable as a matter of state law, and the important federal questions having been timely and properly raised in all the state courts below in which decision could be had, and the state court rulings and statements reported upon the important federal questions being contrary to the way petitioner believes the United States Supreme Court will still unanimously rule, petitioner prays that writ of certiorari be granted.

Respectfully submitted,

THOMAS EISTRAT

In pro se,
November 28, 1960

APPENDIX "A"

Constitutional and Statutory Provisions

APPENDIX "A".

Constitutional Provision and Statutes Which the Case Involves.

I

Article IV, of the Constitution of the United States, which reads as follows:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

II

That portion of Article VI of the Constitution of the United States, which reads as follows:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

III

Article XIV, of the Amendments to the Constitution of the United States, which reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

IV

Article I, Sec. 8, Sub. sec. Fourth of the Constitution of the United States:

"To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States.

V

Article III, Sec. 2, of the Constitution of the United States:

"The judicial power shall extend to all cases in laws and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;..."

VI

U. S. C. 1946, Sec. 1 (10), Chap. 1, Title 11, Bankruptcy Act;

" 'Courts of bankruptcy' shall include the district courts of the United States and of the territories and possessions to which this title is or may hereafter be applicable and the District Court of the United States for the District of Columbia;"

VII

U. S. C. 1946, Sec. 11(a), Chap. 2, Title 11, Bankruptcy Act:

"The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—"

VIII

Section 1908, Code of Civil Procedure, Deering, 1953 Edition, page 741, which reads as follows:

"The effect of a judgment or final order in an action or special proceeding before a court or judge of this state or of the United States, having jurisdiction to pronounce the judgment or order is as follows:

"1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title

to the thing, the will, or administration, or the condition or relation of the person.

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

APPENDIX "B"

Opinions Below

[Civ. No. 24044. Second Dist., Div. Three. May 18, 1960.]

THOMAS EISTRAT, Appellant, v. J. C. WATTENBARGER AND SONS (a Partnership) et al., Defendants; J. C. WATTENBARGER AND SONS (a Corporation) et al., Respondents.

[Civ. No. 24045. Second Dist., Div. Three. May 18, 1960.]

THOMAS EISTRAT, Appellant, v. WILLIAM F. SCHULTHEIS et al., Respondents.

[Two cases.]

[1] **Judgments — Res Judicata.** — The doctrine of res judicata is that an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is, in all subsequent

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[1] See **Cal.Jur.2d**, Judgments, § 213; **Am.Jur.**, Judgments, §§ 161, 162.

McK. Dig. References: [1] Judgments, § 338; [2] Judgments, § 347; [3, 5, 6] Logs and Timber, § 14; [4] Judgments, § 417; [7] Appeal and Error, § 875; [8] Appeal and Error, § 1144; [9] Appeal and Error, § 871.

actions, conclusive of the rights of the parties thereto and of their privies on all material issues which were or might have been determined.

[2] **Id.—Res Judicata—Requisites.**—The doctrine of res judicata applies in a given case where the issue decided in the prior adjudication is identical with the one presented in the action in question, there was a final judgment on the merits, and the party against whom the doctrine is asserted was a party or in privity with a party to the prior adjudication.

[3] **Logs and Timber—Injuries—Conversion—Judgment.**—On appeal from the judgment in an action for conversion of lumber from plaintiff's property, an order of the United States District Court in a prior bankruptcy proceeding directed to defendant in the conversion action which included a finding that he had in his possession a certain amount of lumber belonging to the bankrupt's estate, the bankrupt having been engaged in logging plaintiff's property, could not be held to have been res judicata in the conversion action on the issue whether defendant took and kept the lumber, where the issue in the bankruptcy proceeding was whether defendant held property belonging to the bankrupt's estate, while in the conversion action the issue was whether the lumber covered by the United States District Court's order was the same lumber plaintiff claimed was converted, and the trial court determined such questions of fact adversely to plaintiff.

[4] **Judgments—Res Judicata—Persons Concluded.**—A party to an action in a subsequent proceeding is not bound by a judgment in a prior proceeding, and the doctrine of res judicata does not operate as an estoppel, unless he was a party or privy to such action and the identical issue raised in the subsequent proceeding was determined in the previous case.

[5] **Logs and Timber—Injuries—Conversion.**—In actions for conversion of timber, plaintiff was not entitled to rely on a pretrial order not in the record to support his claim that defendant admitted therein that the lumber he accepted from a third person belonged to plaintiff where the parties stipulated that plaintiff could amend his complaints and all allegations therein would be deemed denied by defendant without further pleading and plaintiff alleged that a certain amount of lumber was cut by the third person and delivered to defendant.

[6] **Id. — Injuries — Conversion.** — In actions for conversion of timber, statements in defendant's memorandum of points and authorities in support of his motion for summary judgment, that defendant purchased lumber more than three years prior to commencement of plaintiff's action for conversion, could not be relied on by plaintiff as conclusive that defendant accepted lumber that belonged to plaintiff, since the memorandum did not deal with the merits of the action but merely with allegations of the pleadings.

[7a, 7b] **Appeal—Briefs—Pointing Out Errors.**—Where appellant claimed that the trial court's findings were not supported by the evidence, but failed to refer to places in the transcript to support his assertions, the appellate court was not required to search more than 400 pages of the transcript to see if there was any evidence to support his claim.

[8] **Id. — Presumptions — Sufficiency of Evidence.** — A reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.

[9] **Id. — Briefs — Pointing Out Errors.** — It is not the reviewing court's province to search the record to ascertain whether it contains evidence that will sustain a contention made by either party to the appeal.

APPEALS from judgments of the Superior Court of Los Angeles County. Jesse J. Frampton, Judge. Affirmed.

Actions for damages for conversion of lumber from certain property. Judgments for defendants affirmed.

Thomas Eistrat, in pro. per., for Appellant.

No appearance for Respondents.

VALLÉE, J.—Appeals from separate judgments for defendants in two actions for damages for the alleged conversion of lumber from plaintiff's property in Tulare County. The actions were consolidated for trial and for decision here.

On August 2, 1948, plaintiff entered into an agreement with Jones Lumber and Mill Company, a copartnership consisting of defendant Tom G. Jones, Danny R. Jones and Clovis Jones, under the terms of which the partnership agreed to cut and pay a specified price prior to October 1, 1950, for all merchantable timber from about 160 acres of timberland owned by plaintiff and his wife. The partnership entered upon the property about August 6, 1948, moved a small mill thereon, and proceeded to cut lumber.

On October 10, 1948, plaintiff served the partnership with a written notice of rescission, claiming default in the terms of the contract.

On June 21, 1949, the partnership assigned all of its assets to defendant Tom G. Jones. On June 24, 1949, Jones filed a petition in bankruptcy in the United States District Court under chapter XI of the Bankruptcy Act. On September 29, 1949, plaintiff, joined by his wife, filed a petition in the bankruptcy proceeding to reclaim the property here involved. About October 30, 1949, Jones was adjudged bankrupt.

In the course of the bankruptcy proceedings the receiver sold lumber cut by Jones to defendant Wattenbarger for $425.26. Later the trustee filed a petition requesting that defendant Schultheis be directed to turn over 10,683 board feet of lumber to the bankrupt's estate. Notice of hearing was personally served on Schultheis and he was represented by counsel at a hearing on May 5, 1950. The referee found: at the time of the first meeting of creditors and appointment of the receiver (September 9, 1949), Schultheis had 10,683 board feet of lumber belonging to the estate in his possession or under his control; after notice of demand to turn over the lumber to the receiver he sold it; the value of the lumber was $640. The order of the referee, issued May 31, 1950, directed Schultheis to pay $640 to the trustee. No appeal was taken.

On September 26, 1951, the United States District Court made an order granting plaintiff's petition to reclaim the property. The court found there had been a continuing violation since the first week of August, 1948, successively by the partnership, defendant Jones, the receiver and the trustee, of a condition in the contract of August 2, 1948, which required compliance with California state laws and California and United States Forestry Service rules and regulations pertaining to logging. The court further found that any default in performance of other terms and conditions of the contract had been waived by plaintiff and his wife by acceptance of payments for lumber cut and logged with knowledge of the delinquency of the partnership and the bankrupt in the performance of the contract. The court held that all rights of the partnership were terminated on October 10, 1948, by the rescission of plaintiff and his wife; that neither the partnership, Jones, the receiver, nor the trustee had any right, title, or interest in, to, or against plaintiff's real property or any of the logs, lumber, or timber located thereon or removed therefrom. The court ordered the trustee to deliver to plaintiff the real property and all logs, lumber, and timber located thereon, the proceeds from the sale of portions of the lumber, and any claims the trustee had against others arising from transfer of logs or lumber felled on the real property, "without prejudice to such right or rights as the petitioners may have against such person or persons or any of them." Thereafter plaintiff made demands on defendants Schultheis and Wattenbarger for the return of the lumber. The demands were refused and the present actions followed.

These actions are two of several brought by plaintiff against various parties on the basis of claims they converted portions

of the lumber cut from the property. (See *Eistrat* v. *Brush Industrial Lumber Co.*, 124 Cal.App.2d [268 P.2d 181]; *Eistrat* v. *Western Hardwood Lumber Co.*, 164 Cal.App.2d 374 [330 P.2d 629]; *Eistrat* v. *Cekada*, 50 Cal.2d 289 [324 P.2d 881].)

In the present actions the court found: sometime in the latter part of August or in early September, 1949, defendant Jones cut timber and logs from the property which amounted to 10,649 board feet of lumber when milled; he shipped the lumber to Schultheis, doing business under the firm name of Sunset Cabinet Shop; the lumber was "substantially mismilled" and unsuitable for the purposes intended by Schultheis and he refused to accept it; the lumber was dumped at a lumber yard nearby where it remained for three to six weeks, suffering further deterioration; on September 19, 1949, the receiver in bankruptcy sold it for $425.96 to defendant Wattenbarger who took possession of it; the $425.96 was paid by the receiver to plaintiff; $425.96 equalled or exceeded the reasonable market value of the timber and logs from which the lumber was derived at the time the timber and logs were cut. The court also found that about July, *1948*, Schultheis had purchased from Jones and paid for certain lumber, which lumber was not the property of plaintiff. The judgments were that plaintiff take nothing in either action.

A certified copy of the order of the referee which directed that Schultheis pay $640 to the bankrupt's estate for lumber which he had obtained was received in evidence. Plaintiff claims the order adjudicated the identical issue at bar as to whether Schultheis took and kept the lumber. He contends it was error for the court to allow Schultheis to testify he did not accept the lumber, thus permitting a collateral attack on the order of the bankruptcy court.

[1] The doctrine of res judicata is that an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is, in all subsequent actions, conclusive of the rights of the parties thereto and of their privies on all material issues which were or might have been determined. (*French* v. *Rishell*, 40 Cal.2d 477, 479 [254 P.2d 26]; *Dillard* v. *McKnight*, 34 Cal.2d 209, 213 [209 P.2d 387, 11 A.L.R.2d 835]; *Bliss* v. *Security-First Nat. Bank*, 81 Cal.App.2d 50, 58 [183 P.2d 312].) [2] The application of the principle in a given case depends upon affirmative answers to these questions: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party

against whom the plea is asserted a party or in privity with a party to the prior adjudication? (*Bernhard* v. *Bank of America*, 19 Cal.2d 807, 813 [122 P.2d 892]; *Dillard* v. *McKnight, supra*, 214; *Citizens Nat. T. & S. Bank* v. *Hawkins*, 87 Cal.App.2d 535, 541 [197 P.2d 385]; *Estate of Eaton*, 38 Cal.App.2d 180, 182-184 [100 P.2d 813].)

[3] The order directed to Schultheis included a finding that he had 10,683 board feet of lumber in his possession which belonged to the bankrupt's estate. It did not include a finding as to when he obtained the lumber, or when the logs from which the lumber was derived were cut. The issue litigated in the bankruptcy proceeding to which Schultheis was a party was whether Schultheis held property belonging to the bankrupt's estate; the issue in the present action was whether the lumber covered in the order of the United States District Court was the same lumber that plaintiff alleged had been converted. If the lumber plaintiff claimed had been converted was not the lumber covered in the bankruptcy proceeding and, as Schultheis claimed, was different lumber which never came into his possession, the order of the United States District Court was not res judicata. Whether the lumber was the same and whether Schultheis received the lumber plaintiff claimed had been converted were questions of fact. As stated earlier, the trial court found Schultheis did not receive the lumber plaintiff claimed had been converted.

A finding supporting the order of the United States District Court on plaintiff's petition to reclaim was that Jones logged and milled in excess of 263,360 board feet of timber from the property during the bankruptcy proceedings and that the trustee had in his possession an account receivable resulting from his sale of a portion of that timber sold to Sunset Cabinet Shop. That finding, however, does not bind Schultheis. He was not a party to that proceeding. [4] As said in *Eistrat* v. *Brush Industrial Lumber Co.*, 124 Cal.App.2d 42 (p. 45) [268 P.2d 181]:

"The rule is established in California that a party to an action is not bound by the judgment in a prior proceeding, and the doctrine of res judicata does not operate as an estoppel, unless he was a party or privy to such prior action and the identical issue raised in the subsequent proceeding was determined in the previous case."

[5] Plaintiff contends Schultheis admitted in a pretrial conference order of January 9, 1957, and in his motion for summary judgment that he accepted the lumber which belonged to plaintiff. The record does not show an order of that

date. It includes an order filed May 13, 1958, entitled "Consolidated Pre-Trial Conference Order" which recites consolidation of the two actions and states: "It appears to the court from the conference that the matter is not ready for a pretrial conference. . . ." The order reset the trial date for September 15, 1958, and stated it had been stipulated by counsel for defendants that plaintiff might file amendments to the two complaints and that all of the allegations in the amendments might be deemed denied by defendants without further pleading. The record shows that amended complaints were filed on September 10, 1958. Plaintiff alleged in his amended complaint against Schultheis that more than 12,000 board feet of lumber were cut by Jones and delivered to Schultheis. In view of the stipulation that all allegations of the amended complaint be deemed denied, plaintiff may not assert that a prior pretrial conference order not in the record settled the issue of Schultheis' receipt of the lumber. [6] In reference to the motion for summary judgment, plaintiff calls attention to the record showing the memorandum of points and authorities in support of the motion of Schultheis for a summary judgment in which the following statement was made: "In both cases the defendants purchased lumber from the receiver in bankruptcy more than (3) years prior to the institution of the plaintiff's Superior Court action for conversion." The statement points out the similarities between the allegations of fact made in *Eistrat* v. *Cekada*, 50 Cal.2d 289 [324 P.2d 881], and those in the case against Schultheis. It does not deal with the merits of the action but merely with allegations of the pleadings. Plaintiff's contention that he had a right to rely on either the pretrial conference or the motion for summary judgment as conclusive that Schultheis accepted lumber which belonged to plaintiff is untenable.

[7a] Plaintiff contends the findings are unsupported by the evidence in that the court found Wattenbarger received only one load of lumber. He says the evidence showed: Wattenbarger took and received two loads of lumber; the court should have found Wattenbarger converted both loads; he (plaintiff) received payment from the receiver for only one load; and he should have been awarded judgment for the other load. Plaintiff's brief does not comply with the rules governing his claim. There are no references to the transcript to support his assertions with respect to the evidence on this point. Rule 15(a) of the Rules on Appeal requires: "The statement [in a brief] of any matter in the record shall be supported by appropriate reference to the record." (50 Cal.2d 16.) [8] It is well

established that a reviewing court starts with the presumption the record contains evidence to sustain every finding of fact. [9] It is not the province of a reviewing court to search the record in order to ascertain whether it contains evidence that will sustain a contention made by either party to the appeal. (*Tesseyman* v. *Fisher*, 113 Cal.App.2d 404, 407 [248 P.2d 471].) [7b] This court is not advised by reading plaintiff's brief where the evidence may be found to support his contention. It would require this court to search more than 400 pages of the reporter's transcript to see if there is any evidence to support his claim. (*Grayson* v. *Grayson*, 132 Cal.App.2d 471 [282 P.2d 565].) We have neither the time nor the inclination to do so.

Other points do not require discussion.

The judgment in each action is affirmed.

Shinn, P. J., and Ford, J., concurred.